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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

WORTHINGTON CORPORATION, *Petitioner*

v.

LEASE MANAGEMENT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Worthington Corporation prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-captioned case on October 9, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, pp. 1a-12a) is reported at 352 F.2d 24. The judgment entered upon the jury verdict is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1965. A timely petition for rehearing was filed on October 28, 1965, and denied on November 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals' holding that the trial court improperly withheld the issue of contributory negligence from the jury, is so devoid of support in the record that it constitutes a denial of due process.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

STATEMENT

This is a diversity action for property damage arising out of an explosion which occurred in Vestaburg, Michigan, on November 24, 1959. Petitioner is a manufacturer of electrical generators; respondent, operator of a natural gas field located near the scene of the loss.

In June, 1958, petitioner contracted with Wolverine Electric Cooperative to install a new generator in its Vestaburg plant. Petitioner was to bear the risk of loss until final acceptance and payment. At the time of the loss, the generator had been installed, but the contract was not completed (R. 94a).[1] On that date,

[1] "R." as used herein refers to the Appellant's Appendix printed and filed in the Court of Appeals.

the Cooperative's plant engineer, Mr. Wood, noticed the new generator was losing power (R. 40a), switched from natural gas to fuel oil and drove to respondent's nearby plant to determine what was wrong. Respondent's supervisory employee, Mr. Lewis, determined nothing was wrong at the field so the two men drove back to the Cooperative's plant to check the line at that location.

Upon arrival, Wood and Lewis first removed and cleaned a gas regulator located on the three-inch part of the line near the generator (R. 57a). Lewis then suggested they "blow out" the three-inch line before replacing the regulator (R. 58a). Wood went to a "gas house" 60 feet away, quickly opened and shut a flow valve while Lewis remained standing next to the opening in the line (R. 51a). Wood opened the flow valve a second time, but before he could close it, dirt and gas blew through the opening, were sucked up into the nearby generator air intake and exploded, killing Lewis and substantially damaging the generator.

Petitioner filed suit in federal court against respondent's predecessor in title on January 4, 1961 (R. 1a), and amended its complaint to add Lease Management on April 24, 1961. The amended complaint charged that Lewis was negligent in conducting the operation which gave rise to the loss (R. 6a-8a). After an initial jury verdict for respondent, petitioner was granted a new trial because of an error in the instructions (R. 20a-26a).[2]

At the close of the second trial, petitioner moved *inter alia* for an order striking the defense of contri-

[2] In its opinion below, the Court of Appeals found the grant of a new trial "well within" the first trial court's discretion (App., *infra*, p. 1a).

butory negligence from the answer and removing the issue from the jury on the ground that respondent had failed to produce sufficient evidence (R. 121a-122a). The trial court agreed that "under the proofs in this case" it "would not be warranted in submitting the issue of contributory negligence for a determination by the jury" (R. 123a).

The jury returned a verdict for petitioner in the sum of $118,778.90. Respondent's motion for a new trial and reduction of verdict were denied (R. 179a), whereupon it filed a timely notice of appeal to the United States Court of Appeals for the Sixth Circuit (R. 2a).

On October 9, 1965, the circuit court reversed the entry of judgment by the trial court and remanded the case for a third trial on the ground that the District Judge improperly withheld the issue of contributory negligence from the jury (App., *infra,* p. 6a). Petitioner filed a timely petition for rehearing which was denied on November 10, 1965. (App., *infra,* p. 14a)

REASONS FOR GRANTING THE WRIT

We fully recognize that this Court will not ordinarily grant certiorari to review findings of fact. Thus parties should generally avoid burdening it with such questions. But the instant case presents such an extraordinary error by a United States Court of Appeals that we are compelled to seek review on the grounds that the holding below violates due process and calls for the exercise of this Court's supervisory power.

1. This Court has made it unmistakably clear that any decision which is totally devoid of evidentiary support or based on no evidence at all violates the constitutional mandate of due process. *Thompson* v.

Louisville, 362 U.S. 199 (1960). The fact that *Thompson* involved review of a criminal conviction under the Fourteenth Amendment, does not impair its application to a civil proceeding in a federal court. The proposition that a dispositive ruling must ultimately rest on some support in the record is fundamental to the very nature of the judicial process, whether exercised in a civil or criminal proceeding. *Cf. Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

The dispositive holding below was that the trial court improperly withheld the issue of contributory negligence from the jury. This decision was based on the Court of Appeals' finding that:

> A careful review of this record convinces us that there was testimony from which the jury could have found or inferred 1) that plaintiff Worthington was responsible for the design and layout of the generator which located its air intake near the removable regulator, 2) that plaintiff knew, or should have known, of the possibility that the regulator might be removed in order to blow out the line while the plant was operating, and 3) that such location of the air intake of an acknowledged dangerous instrumentality was negligence which contributed as a proximate cause of this explosion. (App., *infra,* p. 6a)

The short answer to this statement is that there is absolutely no basis in the record upon which the Sixth Circuit could possibly find support for proposition "1," while "2" is the product of a clear mistake. Hence "3" loses its validity as a conclusion of law since petitioner could not be negligent under any theory without knowledge of a foreseeable danger and responsibility for location of the vent in light of that knowledge.

The only evidence in the record dealing with petitioner's responsibility for the plant layout and location of the intake near the regulator is contained in the following exchange between respondent's counsel and Mr. Wood the Cooperative's plant engineer:

> Q. Now, Mr. Wood, were you there during all the time that this particular engine or any part of it was being installed?
> A. Yes.
> Q. Do you know by whom the lay-out plan was designed or engineered?
> A. Yes.
> Q. By whom was it designed or engineered?
> A. Well, it was the Zimmerman Engineering Company, Grand Rapids.
> Q. And that is an architectural engineering firm?
> A. Architectural Engineers.
> Q. Didn't they work together in conjunction with the Worthington people?
> A. Yes.
>
> (R. 67a)

Respondent did not establish:

—whether petitioner worked with the architects before, after or during the installation of the generator.

—whether petitioner was called in by the architects, volunteered its services or was ordered to assist by the Cooperative.

—whether petitioner had any responsibility for the general location of the generator.

—whether petitioner had any responsibility for the location of the air intake near the regulator.

—whether the question of its proximity to the regulator was ever discussed.

—whether it should have been discussed.

There is nothing to indicate that respondent was precluded from calling a member of the architectural firm located nearby. Nor is there anything to indicate that respondent ever sought to cross-examine any of petitioner's employees on the issue. In short, there is simply nothing in the record beyond the single word "Yes" to describe the nature and extent of petitioner's relationship to the architects and its responsibility, if any, for the location of the generator and its vent near the regulator.

Similarly, the second finding, that dealing with foreseeability, is based on a clear mistake of fact, *i.e.*, the Sixth Circuit's assumption that

> Defendant's testimony at trial tended to establish that the regulator had previously been removed several times to blow out the gas line, and that plaintiff Worthington knew, or should have known, of this possibility. (App., *infra*, p. 5a)

There is no evidence to show that the regulator in question or any other regulator had been removed previously for the purpose of blowing out a line. There was testimony that a regulator had been removed for cleaning previously (R. 96a) and that another portion of the line had been blown out before (R. 65a). But there was no evidence to link these two separate and distinct acts. The record does not indicate whether the regulator referred to in the above testimony was the one in question or, more importantly, whether the portion of the line leading to the generator or any

other portion was "blown out" *at the same time* the regulator was removed for cleaning.

The absence of any connection between these two events and the corresponding source of the court's error is so apparent it requires no further elaboration except to note there was uncontradicted evidence that the precise portion of the line in question—the three-inch section containing the regulator and leading to the generator—had never been "blown out" before the loss (R. 55a). This testimony in no way conflicts with the other evidence and thus should not have been disregarded by the Court of Appeals. Rather it was entirely consistent.

If there were even a possibility of constructing a basis for either finding or inference, the decision below might stand. But by any test of reasonableness, the result cannot be squared with the record or the elemental demands of due process.

2. The decision below also warrants review in the interest of sound administration of justice in the federal courts. The error of the Court of Appeals is clear and substantial. It is not and should not be immune from review merely because it involves a finding of fact. This Court has long recognized an obligation to exercise its supervisory powers to examine such matters when "left with the definite and firm conviction that a mistake has been committed." *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Even concurrent findings of fact below may be reviewed in the presence of "a very obvious and exceptional showing of error." *Graver Tank and Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Thus the question is not one of power, but propriety. We recognize and agree with the proposition that ordinarily the Court will not grant certiorari to "re-

view evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). This policy is appropriately based on a due regard for the demands of the Court and orderly disposition of litigation. But at the same time, we recognize that this Court has on occasion taken appropriate opportunities to remind the lower federal courts that gross errors in dealing with the record will not be tolerated. *E.g., Stringfellow* v. *Atlantic Coast Line R. Co.,* 290 U.S. 322 (1933).

The instant case is susceptible of such treatment. Moreover, a full hearing is not required to make the point since the Court does not have to weigh any evidence or make any new findings of fact. Both petitioner's right to due process and the sound administration of justice can be secured by the granting of certiorari, summary reversal and remand of the case to the Court of Appeals with appropriate instructions.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1966

APPENDIX

No. 15848

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WORTHINGTON CORPORATION, a Delaware Corporation,
Plaintiff-Appellee,

v.

LEASE MANAGEMENT, INC., a Michigan corporation,
Defendant-Appellant.

APPEAL from the District Court of the United States for the Eastern District of Michigan, Northern Division.

Decided October 9, 1965.

Before: O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

EDWARDS, Circuit Judge. This appeal is from a jury verdict and judgment for plaintiff in the amount of $118,-777.90. [sic][1] The suit, brought under federal diversity jurisdiction, arose out of an explosion of a generator being installed by plaintiff on the premises of Wolverine Electric Cooperative. The explosion wrecked the generator and

[1] Defendant Lease Management also appeals from the grant of a motion for new trial following an earlier trial of this case wherein defendant secured a jury verdict. At the conclusion of the first trial District Judge Picard (now deceased) granted plaintiff's motion for a new trial on the ground that his charge has misstated the doctrine of Respondeat [sic] superior under which plaintiff sought to hold Lease Management for the negligence of its employee Lewis. We have reviewed the charge as given by Judge Picard and his opinion on the motion and hold that his grant of the motion for new trial was well within his judicial discretion. Rule 59, Fed. R. Civ. P. We have dealt with this issue separately so that the body of this opinion may deal principally with the issues of the second trial.

killed Lester Lewis, an employee of defendant. Plaintiff claimed (and the jury verdict must be read as agreeing) that defendant Lease Management, Inc.'s, negligence was a proximate cause of the explosion. Defendant Lease Management, Inc., appeals claiming, among other things, that plaintiff was contributorily negligent and that the trial judge committed reversible error by not submitting this issue to the jury.

Wolverine Electric Cooperative is an electric power-producing cooperative which operates a plant at Vestaburg, Michigan. In 1959 it decided to expand its electric power output by installation of a sixth generator and signed a contract with plaintiff Worthington Corporation for purchase and installation of the generator. Worthington started performance of the contract (which placed risk of loss on it until acceptance and payment) and as of November 24, 1959, was still working on the generator, although it was installed and in operation.

The generator was designed to use two types of fuel—natural gas and diesel oil. Wolverine had a contract with a near-by oil and gas field, owned by Rock Oil & Gas Company, for the furnishing of natural gas at a rate more economical to it than diesel oil. The gas came from Rock Oil's Edmore field six miles away via a pipeline owned by Wolverine. Rock Oil's contract required it to furnish gas "dry and free from solids and liquids."

In 1958, after date of Rock Oil's contract with Wolverine, Rock Oil contracted with defendant Lease Management, Inc., to take over management, operation and maintenance of its Edmore field. It appears that under Rock Oil's arrangement with Lease Management, Inc., defendant Lease Management stepped into Rock Oil's shoes in all respects as far as this litigation is concerned, since Rock Oil was dismissed on motion as a party defendant and no appeal is brought pertaining to that dismissal.

On November 24, 1959, the chief operator of the Vestaburg plant for Wolverine, Mr. Myron Wood, noticed that the new generator being installed by plaintiff Worthington was losing power. He switched the generator over from gas to oil fuel and drove to the Edmore field to find out what was wrong. Previously Rock Oil had told Wolverine's personnel to contact a Mr. Lewis at the field about any problems, and Wood did so. Lester Lewis, originally a Rock Oil employee, had been placed on defendant Lease Management's payroll when the latter took over the Edmore operation. Lewis checked and determined there was no trouble at the field, whereupon Wood drove back to the Wolverine plant, followed by Lewis.

At trial of this case, Wood testified that he and Lewis decided to take the "regulator" off the gas pipeline at a point located on the outside wall of the plant. The regulator was located in close proximity to the air intake for the Worthington generator which was still in operation. He testified that Lewis had brought a tool box with him to the plant and that he and Lewis removed the regulator, disassembled and cleaned it out, and reassembled it.

Wood also testified:

"Q. (By Mr. Zelle) What was done after the regulator had been taken apart?
"A. It was reassembled.
"Q. Who reassembled it?
"A. Mr. Lewis and I.
"Q. What was done next?
"A. We went out to blow out the line.
"Q. You went to blow out the line?
"A. That is right."

In any event, Wood then went to a "gas house" 60 feet away where the pipeline meter and valves were located while Lewis stood near the place where the regulator had